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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Assessment and Collection of Regulatory Fees for Fiscal Year 1995	)	MD Docket No. 95-3
	)	

To: The Commission

COMMENTS OF
THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

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SUMMARY

In the Notice of Proposed Rulemaking, the Commission seeks comment on revisions to its Schedule of Regulatory Fees for Fiscal Year 1995 in order to recover the amount of regulatory fees that Congress has required the agency to collect for FY95. This proceeding furthers the implementation of Section 6003(a) of the Budget Act of 1993 insofar as it authorizes the Commission to assess and collect user fees for regulated entities and to amend the Schedule of Fees listed in the Budget Act. NCTA's comments are limited to the Commission's proposals with respect to the assessment of fees for cable-related fee categories.

The Notice proposes to increase the amount of the regulatory fees assessed on cable systems from the 37 cents per subscriber assessed for Fiscal Year 1994 to 51 cents per subscriber for FY95, an increase which will result in approximately an $8 million rate increase for cable subscribers in FY95. It also proposes to increase Cable Antenna Relay Service ("CARS") regulatory fees from $200 per license to $305 per license. Finally, the Notice proposes to increase the fees for receive-only earth stations from six cents per earth station (with a $6 minimum fee) to $120 per meter, an increase in most cases of 10,000%!

The Commission's allocation of over 25% of its regulatory fees to the cable industry is unfair and unwarranted. There is no rational basis for assigning the cable industry such a disproportionate share of the regulatory fees the Commission has been ordered to collect, and the Commission offers none. Indeed, the Notice is simply a collection of assertions and conclusions with little, if any, analysis of the critical components of its fee calculations. The Notice does not justify the increases based on an accurate calculation of the FCC employees devoted to cable-related services nor on the benefits to the payor of the fee, both of which are factors required to be considered by the Budget Act. Nor are the increases justified as a "fair approximation" of the regulatory costs involved as required by constitutional caselaw. Accordingly, at least without additional justification on the part of the Commission, not only would the Commission's action be beyond its statutory mandate, but also it is vulnerable to a Constitutional

"takings" claim since the Commission's proposed fees -- authorized for the sole purpose of defraying the Commission's regulatory costs -- do not appear to reflect a "fair approximation" of those costs.

Constitutional and statutory problems aside, the Commission provides little, if any, substantiation for key components of its calculations underlying the radically increased proposed fees, and without such support, they cannot be adopted. Indeed, its own numbers are internally inconsistent as the amount to be recovered from cable television systems is listed as $29,070,000 in the text of the Notice (at ¶40) but as $29,251,199 in Appendix F to the Notice, while CARS licensees are to recover $635,010 according to the text (¶42) but $635,288 according to the Appendix. And the numbers in Appendix F itself are added incorrectly. The significance of these errors lies not in their magnitude, but as a reflection of the problems inherent in all of the Commission's cable-related calculations.

More significantly, the calculation of the full-time equivalent employees devoted to cable-related services appears significantly overstated while the "payee volume" in each cable-related fee category appears to be understated. This results in a larger proposed fee for each category than is appropriate. The restructuring of the earth station fee from a payment of six cents per earth station (with a minimum fee of $6) in FY94 to $120 per meter in FY95 is particularly indefensible. There are no "feeable" regulatory activities (i.e. policy and rulemaking, enforcement, international or user information services) that can account for such an increase, since receive-only earth stations are subject only to a voluntary registration procedure with renewals once a decade. Indeed, the current filing fee for an earth station registration application ($265) more than covers any FCC processing or scrutiny of the application, and does so for the 10-year period of the registration.

For the reasons stated herein, the Commission must re-examine the FY 95 regulatory fees proposed for (1) cable systems (2) CARS licenses and (3) receive-only earth stations.

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To: The Commission

COMMENTS OF
THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

The National Cable Television Association, Inc., by its attorneys, hereby submits its comments on the Notice of Proposed Rulemaking in the above-captioned proceeding.[1] NCTA is the principal trade association of the cable television industry in the United States. NCTA represents cable television operators serving over 80 percent of the nation's cable television households.

I. INTRODUCTION

In the Notice of Proposed Rulemaking, the Commission seeks comment on revisions to its Schedule of Regulatory Fees for Fiscal Year 1995 in order to recover the amount of regulatory fees that Congress has required the agency to collect for FY95. This

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[1] In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 1995, Notice of Proposed Rulemaking, MM Docket No. 95-3, FCC 95-14, released January 12, 1995 ("Notice")

proceeding furthers the implementation of Section 6003(a) of the Budget Act of 1993[2] insofar as the Act authorizes the Commission to assess and collect user fees for regulated entities and to amend the Schedule of Fees listed in the Budget Act. NCTA's comments are limited to the Commission's proposals with respect to the proposed assessment of fees for cable-related fee categories.

The Notice proposes to increase the amount of the regulatory fees assessed on cable systems from the 37 cents per subscriber assessed for Fiscal Year 1994 to 51 cents per subscriber, an increase which will result in approximately an $8 million rate increase for cable subscribers in FY 1995. It also proposes to increase Cable Antenna Relay Service ("CARS") regulatory fees from $200 per license to $305 per license. Finally, the Notice proposes to increase the fees for receive-only earth station antennas from six cents per earth station (with a $6 minimum fee) to $120 per meter,[3] an increase in most cases of 10,000%! The Commission provides little, if any, substantiation for the radically increased proposed fees, and without such support, they cannot be adopted. More significantly, the proposed fees violate the Budget Act's mandate and are vulnerable to constitutional challenge.

Section 9(a) of the Budget Act authorizes the Commission to "assess and collect regulatory fees to recover the costs of the following regulatory activities of the Commission: enforcement activities, policy and rulemaking activities, user information services, and international activities," the so-called "feeable activities." With respect to the regulatory fees it imposed for Fiscal Year 1994, the Commission determined that it

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[2] Pub. L. No. 103-66, Title VI § 6002(a), 107 Stat. 397 ("Budget Act").

[3] Cable operators employ a significant number of receive-only earth stations, generally in the 4.5-5.0 meter range. For that reason, we discuss the proposed regulatory fees for those earth stations even though they are included in the Common Carrier regulatory fees category. See Notice at ¶51 and Appendix G.

was required to adopt the various regulatory fees provided for in the Budget Act's Schedule of Regulatory Fees. This it did in the Report and Order in MM Docket No. 94-19.[4] As a result, the Commission did not have to engage in any analysis or calculations to determine the regulatory fees for specific services for FY 1994.

However, the Budget Act provides that "[f]or any fiscal year after fiscal year 1994, the Commission shall by rule, revise the Schedule of Regulatory Fees by proportionate increases or decreases to reflect . . . changes in the amount appropriated for the performance of the activities described in subsection (a) for such fiscal year."[5] Among other things, these so-called "mandatory adjustments" are to take into account, and the new fees are to be derived by determining, "the full-time equivalent number of employees performing the activities described in subsection(a) within the ... offices of the Commission, adjusted to take into account factors that are reasonably related to the benefits provided to the payor of the fee by the Commission's activities...."[6] In its FY 1994 Order, the Commission stated that it would "commence a separate proceeding in connection with the assessment of fees for FY 1995 ... [in which it would seek] comment concerning the allocation of costs of our enforcement, policy and rulemaking, information services, and international services, including any necessary adjustments to the classes of services set forth in Section 9(g)'s fee schedule."[7]

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4 Implementation of Section 9 of the Communications Act, Report and Order, 9 FCC Rcd 5333 (1994) ("FY 1994 Order").

5 Budget Act at § 9(b)(2) (emphasis added).

6 Id. at § 9(b)(1)(A) (emphasis added).

7 FY 1994 Order, 9 FCC Rcd at 5339 (¶ 11).

In the Notice, the Commission purports to follow the Congressional mandate for annual mandatory fee adjustments. As it explained:

> We are first to consider the amount we are to collect as set forth in our Appropriations Act. Second, we are to identify the number of Full Time Equivalent (FTE) employees allocated to our enforcement, policy and rulemaking, user information and international activities. Third, we are to determine the amount to be recovered from each fee category, e.g., Common Carrier, by proportionately increasing or decreasing the revenue requirement of each fee category relative to the ratio of FTEs in each category to the total number of FTEs allocated to our regulatory activities. The resulting fee category share of the total amount to be recovered is then prorated among each service within the fee category to determine the cost allocation applicable to each service. Finally, the prorated cost allocation is divided by the number of estimated payment units, e.g., subscribers, for each service within the category in order to determine service fees.[8]

The Commission's methodology is flawed and its allocation of over 25% of its regulatory fees to the cable industry is unfair and unwarranted. There is no rational basis for assigning the cable industry such a disproportionate share of the regulatory fees the Commission has been ordered to collect. With respect to the three fee categories affecting cable operators, the Commission's calculations require further support and documentation or significant revision. As they stand now, they do not reflect an accurate portrayal of the number of FTEs devoted to cable-related services nor do they take into account the benefit to the payor -- both of which are factors required to be considered by the Budget Act. Without additional justification on the part of the Commission, not only are the Commission's proposed fees beyond its statutory mandate, but also they are vulnerable to a Constitutional "takings" claim since the Commission's proposed fees -- authorized for the sole purpose of defraying the Commission's regulatory costs -- do not appear to be a "fair approximation" of those costs. See United States v. Sperry Corp., 493 U.S. 52, 60 (1989)

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[8] Notice at ¶ 6 (footnote and citations omitted, emphasis in original).

(quoting Massachusetts v. United States, 435 U.S. 444, 463 n.19 (1978)); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155(1980). See generally Dolan v. City of Tigard, 114 S.Ct. 2309 (1994).[9]

II. THE COMMISSION'S PROPOSED FEES ARE NOT CONSISTENT WITH THE BUDGET ACT'S MANDATE OR CONSTITUTIONAL REQUIREMENTS

As we demonstrate in Section III below, the calculations upon which the Commission has based its regulatory fee proposals for cable-related feeable activities are significantly flawed and are totally unsupported. But, at the outset, we address a more fundamental problem with the Commission's proposal. Assuming arguendo that the Commission's calculations are correct, the cable industry is being asked to bear a disproportionate -- and fundamentally unfair -- share of the fees which are to be imposed by the Commission. This results from the Commission ignoring its statutory mandate and, as a result, venturing into constitutionally suspect territory.

Congress directed the Commission to adjust its regulatory fees after FY94 by taking into account the number of FTEs performing feeable activities in a particular operating bureau and "factors reasonably related to the benefits provided to the payor of the fee."[10] As the legislative history explained, the Commission also is permitted to make

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[9] Sperry is a "user fee" case which involved fees for the reimbursement of costs in connection with the arbitration of claims of United States claimants against Iran before the Iran-United States Claims Tribunal. It held that, to avoid a "takings" claim, a user fee must constitute a "fair approximation" of the benefits to the user. While FCC regulatory fees are not user fees in the Sperry sense, the Budget Act itself requires that the Commission take into account the benefits provided to the payor of the fee in determining the fee. In any event, if a "fair approximation" of the benefits to users is required by Sperry, it follows, a fortiori, that, to avoid constitutional challenge, a fair approximation of (often unwanted) administrative regulatory costs should be required before imposing regulatory fees designed to recover those costs on a regulatee.

[10] Budget Act at § 9(b)(1)(A).

fee adjustments after FY94, including "reclassifying services when the Commission determines that such changes are necessary to ensure such fees are reasonably related to the benefits provided to the payor of the fee by the Commission's activities."[11] The regulatory fees which are proposed for cable-related services are neither reasonably related to "the number of FTEs performing [cable] feeable activities" nor are they "reasonably related to the benefits provided to the payor of the fee" as required by the Budget Act.

The basic building block upon which all of the Commission's calculations rests is the number of FTEs allocated to the four operating bureau fee categories. Based on that allocation of FTEs by fee category, cable is allocated over 25% of the FTEs, which, in turn, means 25% of the $116,400,000 which the Commission must recover comes from the cable industry. That percentage figure does not even take into account cable's portion of the over $4 million in fees purportedly recoverable from those with receive-only earth stations whose fees are listed in the Common Carrier, not Cable Services, fee category.

There are several problems with placing such a disproportionate burden on the cable industry. First, with respect to the proposed 51 cents per subscriber fee for cable television systems, as indicated in the following section, there are significant flaws in the number of FTEs allocated to the overall Cable Services Fee category, and an accurate FTE count is a requirement of the Budget Act. Second, the Commission is also silent as to the "benefits to the user" or payor of the fee, which are to accrue from the payment of such fees, as required by case law and Section 9(b)(1)(A) of the Budget Act. Third, it is unlikely that the Commission can meet the Sperry test that the fees are a "fair approximation" of the Commission's regulatory costs which the fees are supposed to defray, and, in any event, the Notice is silent on that critical issue. Finally, the

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[11] Conference Report, Omnibus Budget Reconciliation Act of 1993, Rpt 103 - 213, 103d Cong. 2d Sess., August 4, 1993 at 499 (emphasis added). See Budget Act at §9(b)(3).

Commission must be aware that the end result of the increase in the per subscriber fee will be a rate increase of almost $8 million for cable subscribers in FY95.

The proposed CARS and earth station regulatory fees are even more indefensible. Regulatory fees are supposed to recover the Commission's costs for the following activities: (1) enforcement, (2) policy and rulemaking, (3) international activities and (4) user information services. Of these activities, only "user information services" are even arguably relevant to CARS and earth station regulation.

But, neither CARS licensees nor earth station registrants place much, if any, burden on FCC enforcement, policy or rulemaking or international resources. In this regard, It must be recalled that the direct costs of processing the CARS license applications and earth station registrations are accounted for by the Commission's application fees, $180 for CARS applications and $265 for applications to register earth stations.[12] Because there are no "international activities" associated with CARS licenses or domestic receive-only earth station regulation, and little, if any, enforcement, policy or rulemaking activities relating to those two categories, it is difficult, if not impossible, to justify recovering $635,288 from CARS licensees, let alone $4,128,849 from registrants of earth stations on the basis of the regulatory costs incurred for feeable activities for those services. Indeed, the Commission has not even attempted to do so.

In particular, earth station registration applicants not only pay a $265 processing fee, but also their applications are accompanied by a technical frequency coordination exhibit for which they have paid significant sums and which provides the staff the primary

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[12] See 47 C.F.R. § 1.1101 et. seq.; § 1.1106(1)(a)(i) (CARS) and § 1.1105(12)(a)(i) (receive-only earth stations). See also Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989, 5 FCC Rcd 3558, 3574 (1990).

data it needs to register the applicant's earth station.[13] Since registration is for a 10-year term during which time no regulatory activity is required, it is absurd to assume that any significant "feeable activities" which "benefit the payor" are performed with respect to those registrations as required by the statute. Even if some feeable activities were performed for earth station registrants, a 10,000% increase in fees cannot possibly be consistent with the Budget Act's mandate for "proportionate increases," whatever that was intended to mean. Finally, the proposed earth station fees simply cannot be a "fair approximation" of the Commission's costs as required by Sperry. For the above reasons, the proposed earth station fees -- as well as the other cable-related fees -- are plainly violative of the Budget Act's mandate and appear to constitute an unconstitutional taking.

III. THE COMMISSION'S CALCULATIONS REQUIRE FURTHER DOCUMENTATION OR SIGNIFICANT REVISION

A. The Commission's Methodology

Putting aside the statutory and constitutional questions raised by the proposed fees, the Commission's calculations themselves are seriously flawed. There can be no quarrel with the Commission's determination that it must recover $116,400,000 for FY 1995 through the collection of regulatory fees representing the costs applicable to its enforcement, policy and rulemaking, international activities, and user information services. That amount is mandated by statute.[14] But the Commission's calculations apparently go awry when it arrives at the total amount of regulatory fees to be recovered for cable-related regulatory fee activities.

At the outset it must be observed that the Commission's own conclusions are internally inconsistent. First, the text of the Notice (at ¶40) states that $29,070,000 is to

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[13] See 47 C.F.R. §25.131.

[14] Public Law § 103-317, 108 Stat. 1724 at 1737-38 (Approved August 26, 1994).

be recovered from cable television systems while Appendix F states that $29,251,199 is to be recovered from that fee category. Similarly, the text (at ¶42) states that $635,010 is to be recovered from CARS licensees while Appendix F states that the correct figure is $635,288. In fact, the numbers in Appendix F itself do not add up: $29,251,199 plus $635,010 does not "total" $29,824,911 as asserted in the Appendix. The significance of these errors lies not in their magnitude, but as a reflection of the problems inherent in all of the Commission's cable-related calculations.

In this regard, the Commission's fundamental error is in determining the number of FTEs whose activities are assigned to the Cable Services Fee category. This apparent error carries over -- and is magnified -- when the Commission makes the required allocation of the $116,400,000 to be recovered from cable entities based on the percentage ratio of FTEs supporting cable regulatory fee activities and in making the proportionate changes in the statutory fee schedule, since the latter calculation is also based on the original calculation of FTEs devoted to cable-related regulatory fee activities.[15]

In addition to the above errors in calculating the total fee to be recovered for cable-related regulatory fee activities, the Commission's calculations also reflect apparent errors in the "Payee Volume" in each fee category, that is the number of payees responsible for the total fee as calculated by the Commission. This error, miscalculating and thereby employing a smaller number than is appropriate, has the effect of incorrectly increasing the regulatory fee for each cable operator, CARS licensee, and registrant of receive-only earth stations. If the Commission had correctly used the larger number for the "payee volume" number in these fee categories, the fee per each payee would have been smaller than proposed. We briefly describe below the Commission's errors.

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[15] See Notice at ¶¶ 9-12.

B. The Cable Television System Regulatory Fee

The Commission proposes an increase in its "cable television system" regulatory fee from 37 cents per subscriber in FY94 to 51 cents per subscriber in FY95.[16] The Commission's increase in regulatory fees will amount to a $7,980,000 (57,000,000 x [.51 - .37]) rate increase for cable subscribers in FY95, assuming that the FCC's total subscriber figure is accurate. But, more significant for purposes of this proceeding, the proposed increase is unsupported and unsubstantiated.

The first and fundamental flaw in the Commission's calculation is its determination that the FY95 cost allocation for cable systems in $29,070,000. This figure is based on the Commission's previous conclusion that $29,900,000 (25.7% of $116,400,000) should be recovered from cable services[17] which, in turn, was based on the Commission's assertion that there are 361 (or 25.7% of the total) FTEs which should be allocated to cable services.[18] The 361 FTE figure -- upon which the Commission's regulatory fee house-of-cards calculation rests -- is virtually unsupported by record evidence.

The Commission's derivation of its FTE figures is purportedly explained in Appendix C to the Notice. But that "explanation" consists of mere assertions. In it, the Commission asserts that "[o]f the Commission's total of 2,271 FTEs, 846 FTEs are directly assigned to the agency's primary operating bureaus to perform enforcement, policy

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16 Notice at ¶ 40-41 and Appendix F.

17 As noted above, the Commission not only does not fully explain how it divides the proposed $29.9 million between the cable television system and CARS categories, but also it uses internally inconsistent figures. According to the text of the Notice, (but not Appendix F), the $29,900,000 amount is divided between cable television system fees ($29,070,000) and CARS license fees ($635,010), which, of course, do not add up to $29,900,000. See Notice at ¶¶40,42.

18 Id. at Appendix C.

and rulemaking, international and user information activities. An additional 560 FTEs have been identified by the agency as supporting these feeable activities."[19]

Without further explanation, the Commission allocated its FTEs to the relevant operating bureaus, based on those directly assigned to each bureau plus an unexplained attribution of the non-directly assigned FTEs purportedly involved in fee-related activities. The results were as follows:

FEE CATEGORY	FTEs	%
Mass Media	253	18.0
Common Carrier	689	49.0
Private Radio	103	7.3
Cable Services	361	25.7
	1406	100.0

These figures provide the basis for calculating the regulatory fees to be recovered by each fee category. But, at least insofar as they purport to represent the FTEs involved in cable regulatory fee-related activities, they simply do not compute.

The Commission asserts that 361 FTEs are associated with cable regulatory fee activities. But the Cable Services Bureau itself has only 223 FY95 FTEs, as Chairman Hundt recently informed Congress.[20] The additional 138 FTEs assigned to the Cable Services fee category in the Notice do not appear to be accounted for by a fair allocation of

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[19] Id.

[20] See Report to the Commissioners, "Creating a Federal Communications Commission for the Information Age," Report of the Special Counsel to the Commission on Reinventing Government, February 1, 1995 ("Report to the Commissioners"). Chairman Hundt held a press conference unveiling this report on February 2, 1995 where he announced that he was sending the Report (which included legislative recommendations) to the House and Senate Commerce Committees. See Communications Daily, February 3, 1995 at 1-2.

the 560 "unassigned" FTEs supporting feeable activities. For example, even using a straight proportional allocation of the 560 supporting FTEs, cable services-related fee activities should only be assigned 17.6% of the 560 supporting FTEs. This is so because, according to the Report to the Commissioners, the FTEs assigned to the Cable Services Bureau (223) account for only 17.6% of the FTEs assigned to all of the Commission's operating bureaus.[21] But, according to the Notice, the Cable Services fee category must have been assigned 24.6% (138/560) of the supporting FTEs to reach the 361 FTEs ultimately allocated to cable services-related feeable activities.

Moreover, the Report to the Commissioners raises additional questions about the FY95 FTE calculations reflected in the Notice. For example, in the Notice, the Mass Media Fee Category was assigned a total of 253 FTEs for FY 1995.[22] However, the Report to the Commissioners states there are 335 FY95 FTEs in the Mass Media Bureau alone, without even accounting for allocating "supporting" FTEs to Mass Media regulatory fee activities. This apparent anomaly raises a question about whether the other fee categories (such as Cable Services) are bearing a disproportionate share of the FY95

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[21] According to the Report (at 16), the Fiscal Year 1995 FTEs were distributed among the operating bureaus as follows: Mass Media Bureau (335), Wireless Telecommunications Bureau (312), Common Carrier Bureau (270), Cable Services Bureau (223), and International Bureau (124), for a total of 1264 FTEs. The Cable Services Bureau's share of those 1264 FTEs amounts to 17.6% (223/1264). The Report assigns FTEs according to the Bureaus as reorganized since FY94, while the Notice retains the same fee categories (e.g. Private Radio Bureau) as used in FY 1994 despite the reorganization of a number of operating Bureaus. The figures in the Report and Notice may be compared, however, because as the Notice (at Appendix C) points out, "the reorganizations, although resulting in a reassignment of staff and functions, have not significantly changed the type of work the reassigned staff is performing."

[22] Notice at Appendix C.

FTEs, if, in fact, there are more FTEs that should be assigned to the Mass Media Bureau than are reflected in the Notice.

In short, the figure used in the Notice for the Commission's FY 1995 FTEs allocated to cable services regulatory fee-related activities requires significantly more substantiation before it can serve as the basis for cable's proposed share of any increases in FY95 regulatory fees for such activities. Even a slight shift in FTEs assigned to cable can have a significant effect on the amount to be recovered from cable services given the $116,400,000 which must be recovered from all FCC feeable activities.[23] The Commission's FTE calculations either must be modified to reflect the only data in the record (i.e., that included in the Report to the Commissioners) or further documented to support cable's proposed share of regulatory fee increases.

The Cable System fee suffers from an additional flaw. The number of subscribers used as the "payee volume" figure (57 million) appears understated. The Notice states that "[t]hese estimates are based upon information provided by the Commission program managers and supplemented by information contained in actual license databases maintained by the Commission, information provided by industry groups or contained in trade publications, and actual data from FY 1994 regulatory fee collections."[24] No actual figures or data sources are cited.

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[23] For example, if, as is suggested in the Report to The Commissioners, only 17.6% of the 560 supporting FTEs should be allocated for cable services rather than 24.6%, that would allocate 99 rather than the 138 supporting FTEs as proposed in the Notice, resulting in a total of 322 rather than 361 FTEs assigned to cable services. Using that figure, cable services would only be expected to recover 22.9% rather than 25.7% of the $116,400,000 or $26.7 million rather than the proposed $29.9 million which must be recovered from feeable activities.

[24] Notice at ¶ 11.

In fact, the best estimates of cable subscribership indicate that there are more than the 57 million subscribers used in the Notice for "payee volume." For example, A.C. Nielson Co. data estimated in September 1993 that there would be 59,689,070 basic cable households in 1994 and Paul Kagan Associates, Inc. estimated there were 57,935,000 basic cable households as of June 30, 1994.[25] Using either of these two estimates results in a reduction of between one and two cents per subscriber from the proposed 51 cents per subscriber regulatory fee. Accordingly, the Commission must either modify its cable television system regulatory fee or provide the documentation for its calculations that is lacking in the Notice.

C. The CARS Regulatory Fee

The Notice proposes an increase in the Cable Antenna Relay Service regulatory fee from $220 per license in FY94 to 305 per license in FY95.[26] The apparent failure to calculate correctly the FTEs assigned to the overall Cable Services fee category, and the resulting error in the overall amount to be recovered from that fee category, also impacts the CARS calculation, since the CARS fee category is a subset of the Cable Services fee category. For the reasons stated in the previous section, the apparently erroneous (and assuredly undocumented) cable fee-related FTE calculations must be substantiated in order to impose the resulting proposed fee on CARS licensees.

And, as with the cable system calculation, "payee volume" calculations for CARS must also be substantiated or revised. The Notice asserts that, for the CARS fee calculation," [p]ayment units are estimated to be 2,082 licenses" without further

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[25] See National Cable Television Association, Cable Television Developments, Fall 1994 citing A.C. Nielsen Co., Paul Kagan Associates, Inc., Marketing New Media, June 20, 1994.

[26] Notice at ¶ 42 and Appendix F.

elaboration.[27] But there is no support in the record for that figure and it appears quite low. If so, the "payee volume" (i.e. CARS licenses) figure in the Notice must be increased resulting in a smaller regulatory fee per CARS license.

D. The Receive-Only Earth Station Regulatory Fee

Perhaps the most dramatic, unwarranted and indefensible proposed increase in a regulatory fee category from FY94 to FY95 is for receive-only earth station antennas. While listed as a Common Carrier Service,[28] receive-only earth stations are used by virtually all cable operators to receive satellite-delivered programming for transmission to their subscribers. Generally those dishes are between 4.5 and 5 meters. Since 1979, the Commission has steadily deregulated domestic receive-only earth stations. Now agency approval for operation of such earth stations is not required, but the Commission provides for a voluntary registration procedure which offers those who register their earth stations interference protection.[29] The registration is good for ten years and during this ten year period no FCC regulatory action is required with respect to any particular registration.

The FY94 regulatory fee for earth stations of less that 9 meters was six cents per earth station with a minimum of $6 for entities with fewer than 100 antennas.[30] These fees and their structure (i.e. assessed on a per-earth station basis for earth stations under 9 meters) were dictated by the terms of the Budget Act. Nevertheless, the proposed FY95

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27 Notice at ¶ 42.

28 Notice at ¶ 51 and Appendix G.

29 See Amendment of Part 25, 6 FCC Rcd 2806, 2807-08 (1991). See also Regulation of Receive-Only Satellite Earth Stations, 74 FCC 2d 205 (1979); Deregulation of Domestic Receive-Only Satellite Earth Stations, 104 FCC 2d 348 (1986)

30 FY 94 Order at Appendix B, ¶ 41

fee is $120 per meter.[31] The ostensible reason for this change was an attempt to rationalize the previous year's fee schedule which provided for higher fees for fixed satellite earth station antennas of 9 meters or more than for those of less than 9 meters, regardless of the function(s) of the earth station.

The Notice asserted: "This distinction resulted in the anomaly that antennas performing the same function were subjected to different fees, one several thousand percent higher than the other."[32] This statement was made in the context of discussing the fees for transmit-only and transmit/receive earth stations, but the same rationale was advanced for eliminating the size distinction as applied to receive-only earth stations. Whatever factors might lead the Commission to exercise its permissive authority to make the fee basis for transmit-only or transmit/receive earth station antennas uniform regardless of size, given the deregulated status of receive-only earth stations, those factors do not dictate assessing small receive-only earth station regulatory fees on a size basis.

As noted above, over the last 16 years, the Commission has steadily deregulated domestic receive-only earth stations to the point where now only a simple registration procedure is available for those entities seeking interference protection. As a result, receive-only earth station filings are not subject to the same regulatory scrutiny and review as are filings for transmit-only and transmit/receive earth stations, nor need they be. For that reason, the basis for determining the regulatory fees for the two types of earth stations need not be the same.

In fact, the Commission already recognizes that there is a significant difference -- for regulatory and fee purposes -- between receive-only earth stations and transmit/receive

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31 Notice at ¶ 51 and Appendix G.

32 Notice at ¶ 48.

earth stations. For example, the application filing fee for a receive-only earth station registration is $265 while the comparable fee for fixed satellite transmit/receive earth stations is $1755.[33] That the Commission has made such a distinction based upon the function of the earth stations supplies the rationale for maintaining a distinction in how fees are to be determined for receive-only earth stations.

In any event, a better explanation than that advanced in the Notice is required if the Commission is to change a fundamental feature of the fee structure in the Budget Act, as opposed to merely increasing or decreasing the fee for receive-only earth stations from a previous year. A change in the fee structure for small earth stations from the Budget Act's per earth station basis to the Notice's per meter-based fee alone would require a better explanation than that offered by the Commission. When that change is coupled with a 10,000% fee increase -- from (essentially) $6 per license to $600 per license (for the five meter dish generally used with cable systems), the Commission's proposal cannot stand.

Even assuming the Commission is correct in charging for small receive-only earth stations on a per-meter basis, the fee amounts themselves are not substantiated. Neither the calculations by which the Commission reached the amount to be recovered from earth station registrants nor the "payee volume" (meters of earth stations) figure is supported by any data except for the Commission's assertion of their existence. More would be required to substantiate the proposed fee even if the increase were not as dramatic -- and unwarranted -- as proposed.

Moreover, given the deregulated status of receive-only earth stations and the existence of FCC filing fees (currently $265 per registration application) which defray the cost of processing earth station registrations, the Commission is hard-pressed to justify

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[33] Compare 47 C.F.R. §1.1105(12)(a)(i) (receive-only) with id. at § 1.1105(10)(a)(i) (transmit/receive).

recovering over four million dollars in "regulatory fees" for its costs for "regulating" receive-only earth stations. During the 10-year term of an earth station registration, the Commission simply does not undertake any "feeable" activities with respect to that registration -- no enforcement, policy or rulemaking, international or user information services. To the extent it does, those minimal activities cannot possibly justify recovering over $4 million for its "regulation" of earth stations. And, as discussed earlier, the Commission's small earth station fee proposal hardly meets the Budget Act's "benefit to the payor" test or the Sperry "fair approximation of costs test."[34] Finally, whatever "proportionality" test is called for by Section 9(b)(2) of the Budget Act, it can hardly be met by an increase of 10,000%. For all of the above reasons, the proposed earth station fee must be revised significantly.

CONCLUSION

For the reasons stated above, the Commission must re-examine the FY 95 regulatory fees proposed for (1) cable systems (2) CARS licenses and (3) receive-only earth stations. The calculations upon which the proposed fees are based suffer from significant flaws, particularly with respect to FTEs assertedly involved in cable feeable activities and the payee volume in each case. If the Commission is to avoid constitutional and statutory challenges to its fee decisions, it must provide greater substantiation for its

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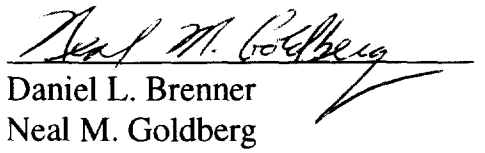
[34] Since earth station registrations have been voluntary for over fifteen years, imposing a fee on such filed registrations smacks of fundamentally unfair "retroactive" agency action and may have the unfortunate consequence of inhibiting future filings.

calculations and also demonstrate that it has correctly accounted for the "benefit to the payor" of the fee in each fee category and that the fees reflect a fair approximation of the regulatory costs sought to be recovered.

Respectfully submitted,



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